

Dubé v. CTS Canadian Career College, 2010 HRTO 713 (CanLII)

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HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Ritchy Dubé

Applicant

-and-

CTS Canadian Career College Inc. and Barbara Thibodeau

Respondents

DECISION

Adjudicator: Faisal Bhabha

Date: March 31, 2010

File Number: 2008-00082-I

Citation: 2010 HRTO 713

Indexed as: **Dubé v. CTS Canadian Career College**

APPEARANCES

) Ritchy Dubé, Applicant	))	On his own behalf
) CTS Canadian Career College Inc., Respondent	)))	David Camelleti, Counsel
Barbara Thibodeau, Respondent	)))	Edward Conroy, Counsel

BACKGROUND

[1] The applicant filed an Application with the Tribunal on July 17, 2008, under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”). He claimed that he suffered discrimination in the area of employment on the basis of disability and record of offences and that he was subject to reprisal or threat of reprisal by the respondents. The respondents deny the allegations.

[2] On May 11, 2009, the Tribunal convened the first day of hearing in Sudbury. A number of preliminary issues were raised, including an issue with respect to the involvement of the personal respondent, who did not attend the hearing. The hearing proceeded in her absence, with an Interim Decision in *Dubé v. CTS Canadian Career College* ([2009 HRTO 689 \(CanLII\)](#)), dated May 26, 2009, addressing the issue of the personal respondent’s involvement.

[3] On the first day of hearing, I heard evidence from the applicant and his two witnesses, Janine Roy, a professional contact, and Shari Michaud, his girlfriend. I also heard from the corporate respondent’s witness, Lee-Anne Jefferson, a former employee of the corporate respondent. The hearing re-convened for an additional three days of evidence and oral argument on September 30, October 1 and 2, 2009, which included the participation of the personal respondent and her counsel. Ms. Thibodeau testified on her own behalf and called no further witnesses. The corporate respondent called as witnesses Phyllis Anderson, Dean Charran and Carlos Carvalho, who are all representatives of the corporate respondent. The witnesses were all subject to an

exclusion order, meaning that no witness who was not a named party was permitted to be in the hearing room during the testimony of any other witness.

DECISION

[4] The corporate respondent, CTS Canadian Career College Inc., violated the applicant's right to equal treatment in employment under section 5(1) of the *Code* by discriminating against him on the basis of his record of offences. This discrimination occurred directly when the corporate respondent withdrew a job offer to the applicant after learning of his criminal history and failed to provide a lawful reason for the decision. The corporate respondent is liable for damages arising from its discriminatory hiring decision.

[5] The personal respondent, Barbara Thibodeau, is not liable for the violation of the applicant's rights under the *Code*. At all material times, she was acting in the scope of her duties as a staff member of the corporate respondent. To the extent that the personal respondent's actions are found to have contributed to the breach of the *Code*, it is the corporate respondent that is liable for those actions.

EVIDENCE

[6] The applicant testified that he is a well-known ex-offender and recovering addict. He has detailed his experiences in prison in his 2002 autobiography *The Haven*; has published numerous articles and op-eds; and has given interviews and spoken publicly about his experiences both as an inmate and as someone who has vanquished an addiction. He testified that he has been off drugs and out of prison for over 20 years, and has devoted virtually his entire adult life to supporting and advocating on behalf of people with addictions and people serving time in jail. He filed numerous supporting documents demonstrating his public profile with respect to these issues. The respondents did not contest the evidence on this point.

[7] Specifically, with respect to the claim of discrimination on the basis of a "record of offences", the applicant testified that he had a prolific criminal record from his youth and early adulthood. He has been convicted numerous times, most notably for armed robbery and manslaughter, for which he served time in a federal penitentiary in the early 1980s. In 2006, the applicant received a pardon for his offences, a copy of which was filed with his Application, and admitted into evidence. The respondents did not contest any of this evidence.

[8] The applicant testified that on May 12, 2008, he interviewed for a job with the corporate respondent. He met with the personal respondent and Teresa Haley to discuss his qualifications for a position as Addictions Interventions Instructor, a job which would

require him to prepare the material to teach a course to addictions counselling students, apply the curriculum and deliver it to students. The position advertised a 39-week contract, involving five hours of instruction per day, paid on an hourly basis.

[9] The applicant testified that he felt the one-hour interview went very well. He sensed that the personal respondent was excited about his candidacy and when she promised to call him by 4:00 p.m. that afternoon to let him know about her decision, he was confident about his prospects of employment.

[10] The applicant testified he went home after the interview feeling positive. He waited at home for the call with his girlfriend, Shari Michaud. When the phone rang, he testified he was resting and let the answering machine take the call. He stated that he listened to the message, in which the personal respondent identified herself and said that she was very pleased to inform him that he was the successful candidate. Based on his qualifications, the applicant understood he was being offered an hourly pay rate of \$25.00. The personal respondent asked the applicant to come in the next day to sign the employment contract and go over some other documents. The applicant phoned the personal respondent back later that afternoon and confirmed arrangements for the next day's meeting. That evening, he and Ms. Michaud celebrated the good news.

[11] The applicant testified he attended at the personal respondent's office the next morning at 11 a.m. as requested. He stated that the personal respondent's demeanour seemed different from the previous day; she appeared to him uncomfortable and stand-offish. The applicant testified that the personal respondent told him that she was not in a position to offer him the job because he had not been forthright with her about his past. When the applicant asked her to clarify what she was referring to, he testified she responded that the applicant is "well known in the community" for his criminal past. She wanted to know why he had not disclosed this history during the interview. The applicant testified that the personal respondent refused to provide him with details about what she had heard, who was the source of her information, or what was the context in which she learned the news that informed her decision to rescind the offer of employment.

[12] The applicant testified that he told the personal respondent that he had been pardoned of all his offences. He also highlighted that he had cited "personal experience" with addictions issues during his interview, but that the respondent did not follow-up about the nature of that experience. The applicant testified that while he did not feel he had any duty to disclose his addictions and criminal past, he also did not try to suppress the information.

[13] The applicant testified that the personal respondent stated that hiring the applicant would have “catastrophic consequences on the College”. The applicant testified that he understood the personal respondent to mean that it would be bad for the College’s reputation to hire someone with his past, and that the students may not like it. He suggested that the College consider putting the issue to the students for input. The applicant believed that his life experience should be seen as a benefit, not a weakness, for the position of Addictions Intervention Instructor. However, he testified the personal respondent was unconvinced, and insisted that she must “withdraw the offer”.

[14] The applicant stated that he raised his concern about discrimination during his meeting with the personal respondent, telling her that he believed her decision to be improper and contrary to the *Code*. Before the meeting ended, the applicant testified he pleaded with the personal respondent to speak with his references — people in the community who know him and who would attest to his successful rehabilitation and good character.

[15] After leaving the meeting, the applicant testified he returned home and immediately phoned a number of his references asking them to contact the personal respondent and offer support for his candidacy for the position. He also forwarded a copy of his pardon to the personal respondent. He shortly received phone calls back from Linda Carter and Janine Roy confirming they had spoken with the personal respondent, and the applicant witnessed Ms. Michaud phone the personal respondent and plead with her to give the applicant a chance. These efforts were to no avail.

[16] The applicant’s evidence is that the events he describes left him feeling emotionally drained. He testified that he hit “rock bottom”, losing hope that society would ever treat him as a full member. He stated that he made some efforts to find work in his field, but that it took time. He continued to operate his independent business, Richard and Associates, as a counsellor and motivational speaker while applying for work. In April 2009, he secured full-time employment as the Executive Director of a mental health and addictions facility in Sudbury.

[17] Janine Roy, a professional colleague who formerly worked with the applicant at the Ontario March of Dimes, testified on behalf of the applicant. Ms. Roy testified that she was contacted by the personal respondent on or about May 13, 2008 to discuss the applicant’s candidacy for the position. She testified that the personal respondent asked her about the applicant’s “background” and whether she thought CTS students in the addictions counselling program would be comfortable having the applicant as an instructor. Ms. Roy testified that she replied that in her view, it would be a benefit to the students to have someone with the applicant’s experience and expertise teaching them.

Moreover, she described the applicant as a good “role model” for other recovering addicts and former convicts.

[18] Ms. Michaud’s evidence confirmed the applicant’s rendition of events on May 12 and 13, 2008. She testified that when the applicant returned home from the job interview, he was excited about his prospects. Ms. Michaud heard the answering machine pick up the call from the personal respondent, who identified herself and stated that the applicant had been the successful candidate for the position and requested that he come in the following day to sign some papers. The next day, when the applicant returned home from his meeting with the personal respondent, Ms. Michaud testified the applicant told her that the personal respondent had said that she could not give the applicant the job because he had not been honest with her about his past.

[19] Ms. Michaud testified that she was very upset and made a phone call to the personal respondent demanding an explanation. She testified that the personal respondent told her that she was upset with the applicant because he had not told her “everything” during the interview. According to Ms. Michaud, when pressed, the personal respondent told her that the decision not to hire the applicant had come from head office in North Bay.

[20] Ms. Michaud also testified to the impact the experience had on the applicant, stating that he appeared to be demoralized and losing hope. Ms. Michaud said she despaired the community would never give the applicant a chance to redeem himself.

[21] The personal respondent, Barb Thibodeau, testified that she worked for the corporate respondent from July 2001 to August 2008. At the time of her resignation and at all material times in relation to this Application, her position was Campus Director of the corporate respondent’s Sudbury campus. Her evidence regarding the interview on May 12, 2008, was largely consistent with the applicant’s evidence. She was impressed with the applicant’s credentials and felt he would be an ideal person to fill the position of Addictions Intervention Instructor. She confirmed that on the afternoon of May 12, 2008, she left a voice message on the applicant’s answering machine offering him the position, and requesting that he return the following morning with necessary documents to complete the hiring process.

[22] Ms. Thibodeau testified that she did not have the power to make hiring decisions on her own, a claim which was disputed in the testimony of the Chief Administrative Officer of the corporate respondent, Phyllis Anderson. The personal respondent testified that she understood her role to be to make recommendations to Ms. Anderson and to the College’s President, Dean Charran, who ultimately would authorize any decision to hire.

Both Ms. Anderson and Mr. Charran were based at the corporate respondent's head office in North Bay, while Ms. Thibodeau worked out of the Sudbury campus.

[23] The personal respondent testified that on the morning of May 13, 2008, at around 8:30 a.m. when she arrived at work, she was approached by an administrative assistant, Cathy Johnson, who told her she knew the applicant personally and advised her that the applicant had been convicted of "murder" some time ago. The personal respondent testified that Ms. Johnson did not provide any further detail.

[24] At around 9:00 a.m., the personal respondent testified she contacted Ms. Anderson to advise her of the information she had learned about the applicant and to seek advice. She was told to leave it with Ms. Anderson and wait for further instruction. Within the hour, she stated Ms. Anderson phoned her back, told her she had spoken with Mr. Charran and that a decision was made not to extend the offer of employment to the applicant. Ms. Thibodeau stated she understood this decision to be based on the fact of the applicant's undisclosed criminal past.

[25] Ms. Anderson's evidence differed from Ms. Thibodeau's. First, she asserted that the decision to hire or fire was entirely within Ms. Thibodeau's discretion as Campus Director and that any opinion offered from Head Office was merely advice. Mr. Charran confirmed in his testimony that the personal respondent had exclusive authority to make hiring decisions and that the College's head office had no involvement in the decision to hire, or not to hire, the applicant.

[26] Ms. Anderson testified that on the morning of May 13, 2008, she received a phone call from Ms. Thibodeau, who was uncertain about how to proceed with respect to the applicant in the light of new information she had received from her staff about him. Ms. Anderson testified that her opinion was that the College's reputation could suffer from hiring someone with the applicant's past, and suggested to Ms. Thibodeau that she check his references thoroughly.

[27] On cross-examination, Ms. Anderson conceded that she stated to the applicant, "I don't think I would hire him." However, she maintained that she was not Ms. Thibodeau's superior and that her advice on the matter was not authoritative. Further, she denied stating to Ms. Thibodeau, "leave it with me", or that she conferred with Mr. Charran and instructed Ms. Thibodeau to not offer the position to the applicant.

[28] Ms. Anderson also testified that she did not know the details about the applicant's criminal past, only that he had a record, and stated that she felt it would be bad for the College's reputation to hire an instructor in the addictions program who had a criminal

record of any sort. When asked on cross-examination about her knowledge of the *Code* and the relevance of a pardon, Ms. Anderson responded that she knew nothing about such matters and that her only concern was with the College's reputation. Ultimately, she stated that the decision was entirely up to Ms. Thibodeau as Campus Director.

[29] The personal respondent testified that, in her view, while it was not a written requirement that candidates for employment provide a criminal background check, it is within the rights of the employer to request documentation. She stated that it was her assumption that someone joining the College as an instructor would have a clear criminal record background, which she explained means that nothing shows up on their criminal record. She testified that this is the same procedure adopted for students, though exceptions are at times made for students depending on their circumstances (such as the severity of the crime and how much time had passed). She explained that her understanding of the rationale for the policy with respect to students was to make sure the student would be employable upon graduation. She believed that the same policy should be applied to teaching candidates because, otherwise, she feared her superiors would be more reluctant to adopt her hiring recommendations.

[30] After his meeting with the personal respondent on May 13, 2008, the applicant persisted in trying to convince her to reconsider the decision not to hire him. In a lengthy email, he outlined his qualifications and begged the personal respondent to give him a chance to prove himself. He raised his concerns about discrimination directly: "We are experiencing conflict and I feel betrayed and discriminated against. You offered me the job and yanked it from me."

[31] When his efforts with the personal respondent stalled, the applicant began a broader public awareness campaign. On May 14, 2008, he sent an email to Lorna Forrest, the College's Financial Aid Officer at the Sudbury campus, indicating that he felt discriminated against and threatening to speak to the press and politicians, and to commence legal action. Without responding to the applicant, Ms. Forrest forwarded the email to the personal respondent and Ms. Anderson. The applicant sent out numerous emails in the days after the interview to various people at the College and, in at least some instances, to the entire staff of the College, complaining of discrimination, seeking support and threatening legal action.

[32] Mr. Charran, the College's President, testified that it was around this time that he became involved in the matter. He testified that he advised the personal respondent how to deal with the situation. He believed something needed to be put in writing to the applicant outlining the College's position on the legitimacy and fairness of its hiring decision. The program co-ordinator, Theresa Haley, had by this point come forward to

teach the course at issue. Mr. Charran testified that he consulted with the College's then-counsel, Ed Brogan, who drafted a letter to the applicant confirming the College's decision not to hire him. The personal respondent signed this letter with no objection. Mr. Charran testified that he believed this course of action to be the most fair, above-board and appropriate manner of dealing with the situation.

[33] The College's evidence with respect to who it was decided would teach the course was contradictory. Lee-Anne Jefferson testified that she was hired to teach the course. She testified as to her qualifications as an addictions counsellor, and stated that in early May 2008 she was invited for an interview after having applied for the addictions instructor position with the corporate respondent. She testified that following the first interview, she then was required to go through a second interview, a teaching day, a presentation to the class, follow-up with the coordinator, and was asked to do a trial, 45-minute PowerPoint presentation on one of the courses. She testified that she signed an employment contract on or about May 20, 2008.

[34] The personal respondent testified that Ms. Jefferson was never a serious candidate for the position, and was not even offered an interview, until the decision was made not to hire the applicant and no other appropriate candidate was available. She testified that she understood Ms. Jefferson had previously been a teaching assistant at the College but that feedback about her performance was not positive. The personal respondent changed her mind about Ms. Jefferson as a direct result of the events surrounding the applicant's candidacy and his subsequent campaign, as pressure mounted to fill the position. On or around May 20, 2008, the personal respondent recommended the College hire Ms. Jefferson, who began teaching around the middle of July. By August, the personal respondent had quit the College.

[35] Carlos Carvalho is the Chief Executive Officer of the CTS Group, which owns and operates the College. Mr. Carvalho is Ms. Anderson's and Mr. Charran's direct supervisor. He testified that he had no involvement in this matter until July 7, 2008, when he was copied on an email the applicant sent to a mass list of College staff email addresses. In that message, the applicant repeated his allegation of discrimination in the College's hiring practices. Mr. Carvalho testified that at this time he also became aware of a number of similar email messages the applicant had sent to various College staff members in May 2008. Because the email threatened litigation, Mr. Carvalho forwarded it to the College's then-counsel, Mr. Brogan.

[36] Ms. Jefferson relayed an encounter she had with the applicant on July 10, 2008. She testified that the applicant "confronted" her outside of the College one day while she was on a break with two of her students. At the time, Ms. Jefferson testified that she was

not aware of the dispute between the College and the applicant. She described the encounter, said that the applicant greeted her with hello, asked the students their names, and then began to discuss the “problem” he said he was having with the College. She testified the applicant asked the students whether they would enjoy being taught by someone with his addictions and criminal history. Ms. Jefferson testified that she and the students felt uncomfortable with the applicant’s approach and that the applicant’s behaviour and tone frightened her. She complained to College administration and filed an “occurrence report” which was entered into evidence.

[37] On September 22, 2008, Ms. Jefferson testified that she received a “terrifying” email from the applicant followed up by a telephone call. The applicant’s email to Ms. Jefferson appears on its face to be a plea for assistance and support. The applicant reminded her of their former acquaintance, made the case for why he felt he was discriminated against, and asked whether she would be willing to support him and meet him for a “tea or coffee sometime”. He further stated that he was aware that she had been hired to teach the course and added, “I am not at all upset or resentful with you since you had nothing to do with the decision.”

[38] Ms. Jefferson advised the College immediately, and the next day, September 23, 2008, received a further email from the applicant accusing her of betraying his confidence. The email concluded with: “Shame on you for your spinelss [sic] and cowardly self serving behaviour.” Ms. Jefferson testified that she was so disturbed by the applicant’s communication that she resigned from the College on September 24, 2008, citing perceived risks to her “wellbeing and safety”, and a climate of “stress and fear”.

[39] On September 26, 2008, former counsel for the corporate respondent, Mr. Brogen, wrote to the applicant to advise him that his behaviour was being referred to the police, along with the “history of this matter and a request for further investigation”. Any further emails to the College, its students and its staff would “be considered a trespass, harassment, and a threat; and [the College] will take all legal action against you as may be permitted by law.”

[40] It appears that after the September incidents, there was a lull in the applicant’s advocacy efforts, though on November 14, 2008, he communicated directly with Mr. Charran offering his apologies for his interaction with Ms. Jefferson and proposing to “leave this behind us and resume negotiations.” On December 24, 2008, the applicant sent a further mass email to a number of recipients, including Mr. Carvalho, accusing them of discrimination and detailing its alleged impact.

ISSUES TO BE DETERMINED

[41] The facts of this case give rise to the following issues to be decided:

1. Did the respondents discriminate against the applicant on the basis of his record of offences and/or disability in its hiring decision?
2. If yes, what remedies are appropriate?

FINDINGS

[42] The applicant alleges disability discrimination, though there is no directly relevant evidence applicable to the circumstances of his case. For example, there is no medical evidence establishing that the applicant is a person with a disability. The applicant's disability discrimination argument is based on alleged systemic discrimination against individuals addicted to drugs and/or alcohol. The applicant asked the Tribunal to make findings based on what amounts to an intersectional analysis linking addictions and criminality. In support of this argument, the applicant relied on a Report of the World Health Organization on alcohol, aggression and violence, as well as the Ontario Human Rights Commission Policy on Drug and Alcohol Addiction and its Policy on Disability Accommodation. There was insufficient evidence for me to draw any conclusion about systemic or direct discrimination on the basis of an addiction disability in the circumstances of this case.

[43] On the basis of the evidence before me, I am persuaded that the applicant was offered employment with the corporate respondent and that this offer was rescinded upon the discovery of the applicant's record of offences.

[44] The corporate respondent's evidence sought to establish that the applicant was not hired because a more suitable candidate, Lee-Anne Jefferson, was instead hired. While Ms. Jefferson was ultimately put into the instructor position, I accept Ms. Thibodeau's evidence that Ms. Jefferson was not initially a serious contender for the position. It was only later, sometime around May 20, 2008, that Ms. Jefferson was offered the job, after the applicant began a mass email campaign alleging discrimination, which caused the College substantial consternation.

[45] In the letter dated May 22, 2008, Ms. Thibodeau formally advised the applicant that he would not be hired for the position due to "an existing member of faculty" being available to teach the course. On cross-examination, Ms. Thibodeau admitted to having "no clue" as to who the "existing" faculty member was. Her understanding was that Ms. Jefferson had formerly been employed with the College, but was not at the time of her

hire. Mr. Charran testified that he believed the “existing” faculty member being referred to was Ms. Haley.

[46] The bulk of the evidence supports a conclusion that Ms. Jefferson was already under consideration by around May 20, 2008, and was ultimately hired to teach the course. It is most likely that she was the individual referenced in the May 22, 2008 letter. This means that the letter was misleading if not duplicitous, given that Ms. Jefferson was not an existing faculty member. In any event, it is clear that the letter, though signed by Ms. Thibodeau, was prepared by her superiors in consultation with legal counsel in an attempt to legitimize, after the fact, the decision not to hire the applicant. Mr. Charran acknowledged that by this point, he was concerned about possible legal implications, given the applicant’s threats of litigation.

[47] As to the events of the morning of May 13, 2008, I find that upon learning about the applicant’s criminal past from an administrative assistant at the College, Ms. Thibodeau contacted Phyllis Anderson to seek advice and direction. Whether Ms. Thibodeau had formal authority to make hiring decisions on her own is not relevant, given that there is no dispute on this occasion she conferred with Head Office with a view to obtaining direction on how to proceed. While Ms. Anderson may not have been Ms. Thibodeau’s superior, I accept Ms. Thibodeau’s evidence that she viewed Ms. Anderson as an authoritative voice and someone who communicated direction from the College’s top executives – in particular, Mr. Charran. This fact was confirmed indirectly by Ms. Anderson on cross-examination, when she stated that prior to being the Chief Administrative Officer, she had served as the Human Resources Director of the College and continued to act in that capacity informally. She admitted, however, to having no formal training in human resources.

[48] I have no doubt that Ms. Thibodeau was told not to hire the applicant on account of his criminal past, a decision with which she fully agreed. I also accept Ms. Thibodeau’s evidence that she genuinely believed her employment was already compromised by a perception she had not done her job properly by failing to check out the applicant’s background in sufficient detail, and that she was expected to “clean up” the problem she had created. All of this radiated a clear signal from the corporate respondent that a person with the applicant’s record of offences was not considered a suitable candidate for teaching in the College’s addictions counselling program.

ANALYSIS

[49] Section 5 of the *Code* prohibits discrimination in employment on the basis of “record of offences.” That term is defined in section 10(1), as follows:

“record of offences” means a conviction for,

- (a) an offence in respect of which a pardon has been granted under the [Criminal Records Act](#) (Canada) and has not been revoked, or
- (b) an offence in respect of any provincial enactment;

Record of Offences Discrimination

[50] The Supreme Court of Canada has emphasized that the purpose of extending anti-discrimination law to those convicted of criminal offences is to protect them from the unjustified and indefinite social stigma that operates to exclude people with a criminal conviction from the labour market well after sentences are served and a pardon has been obtained. See: *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, [2003 SCC 68 \(CanLII\)](#), [2003] 3 S.C.R. 228. The Court described the nature of the discriminatory treatment as follows:

An employee is unfairly stigmatized if the offence committed is not objectively connected with the employment or if the employee has obtained a pardon for it. This is true regardless of the seriousness of the crime committed. Accordingly, with the exception of the justification, the law is broken if the differential treatment results from a perception that the employee is less capable of performing the work, and less worthy of recognition as a human being because of his or her criminal record [para. 30].

[51] It is well understood that the applicant's onus in human rights cases is to establish first a *prima facie* case. In order to do so here, the applicant must establish, on a balance of probabilities, both: (1) that he is a person who fits the section 10 definition of “record of offences”; and (2) that his record of offences was a factor in the respondent's decision not to hire him.

[52] Upon establishing these two elements, the applicant will have discharged his onus of making out a *prima facie* case. The respondent may choose to defend its decision on the basis that the absence of a record of offences is a reasonable and *bona fide* qualification for the job, which considers the relationship between the offence and the essential duties of the job. In this case, the respondents did not mount such a defence, so my analysis of the present case will only consider whether the applicant has established the essential elements of a *prima facie* case of discrimination.

Application to the Present Case

[53] In the light of my factual findings, there is no question that the applicant's criminal past fits within the definition of section 10(1). Because I have found that the respondents offered the applicant employment and then rescinded that offer on the basis of the

applicant's criminal past, I also have no difficulty finding that this decision was discriminatory within the meaning of section 5 on the basis of his record of offences.

[54] In argument, the corporate respondent suggested a theory, first, that the applicant was not in fact offered the job and was not the strongest candidate considered for the position; and, secondly, that the applicant's behaviour justified the respondents' decision not to hire him. With respect to the first claim, it is not supported by my evidentiary findings, which provide no basis in fact for the claim that the applicant was never offered the position or that a more qualified candidate was hired.

[55] With respect to the second claim, whether the applicant subsequently engaged in intimidating and vexatious conduct is irrelevant to the question of the College's liability for discriminating against him by withholding an offer of employment on May 13, 2008. In any event, I find that while the applicant did engage in a strident campaign to expose the discrimination to which he had been subjected, I am unable to characterize his conduct as harassing or vexatious. His reaction to a discriminatory hiring process was brash, but by no means beyond the pale given his status and circumstances. The respondents had a duty to respond meaningfully to the applicant's serious and well-founded allegation of discrimination. They failed to do so, and as such contributed to the deterioration in communications with the applicant and to any erosion of staff or student morale which they attempt to blame on the applicant.

[56] It was apparent that much of the testimony describing the applicant as threatening and frightening revealed more by way of stigma and stereotypes based on his past convictions than reasonable perceptions of his behaviour or actual characteristics. Evidence of the social stigma against persons with a criminal past, which has been acknowledged by the Supreme Court of Canada (see *Maksteel, supra*), was apparent in the words and demeanour of some of the respondents' witnesses. It is precisely such stigma, and the disadvantage conferred by it, that the *Code* is designed to protect against.

[57] It is worth noting that the applicant was under no obligation to disclose the fact of his past convictions in this case. It is clear on the facts that the personal respondent was outraged by what she perceived to be a fundamental breach of trust on the applicant's part for failing to disclose in the interview what the personal respondent felt to be critically relevant information. There was no assertion that the applicant had misrepresented his history or lied; only that he had failed to offer the information about his criminal convictions. In the absence of a reasonable and *bona fide* occupational standard requiring a clean criminal record, there was no justification for the College to rescind its offer due simply to the applicant's failure to disclose his criminal past.

[58] The purpose of a pardon is to restore the person, save very limited exceptions, to the same social status he would otherwise enjoy but for the fact of the conviction for which a pardon has been obtained. The applicant was entitled to be considered for the position without the disadvantage of disclosing his past, in the same way as others are not required to not disclose other *Code*-protected information that an employer might improperly regard as problematic (e.g., the existence of a disability or a pregnancy). See *Maciel v. Fashion Coiffures Ltd.*, 2009 HRTO 1804 (CanLII); *Thompson v. Selective Personnel*, 2009 HRTO 1224 (CanLII).

[59] At an institutional level, the corporate respondent failed to properly incorporate *Code* principles in its hiring process. Both the personal respondent and other staff members of the corporate respondent, notably Phyllis Anderson, the Chief Administrative Officer who testified she played an ongoing *de facto* role as Human Resources Director, were demonstrably unfamiliar with the *Code* and in particular with the protection against discrimination on the basis of a record of offences. Even after the applicant raised the issue of discrimination and forwarded a copy of his pardon to the personal respondent, the decision not to hire him remained firm without any serious effort to articulate a defence or lawful explanation. Ms. Anderson and Ms. Thibodeau both testified that their decision would be the same if they were to do it over. I find that this deficiency on the part of the College gives rise to corporate liability only, despite the personal respondent's direct involvement in the discriminatory conduct.

[60] The corporate respondent did not advance a defence to the discriminatory hiring decision. Implied in some of the evidence was the notion that the College's reputation would suffer as a result of hiring the applicant; that it could adversely affect its standing in the community and would erode the morale of students. This evidence was not, however, harnessed in support of an undue hardship argument or any contention that the applicant's offence was connected with the employment, so it is unnecessary for me to analyze this evidence. Suffice it to say the claims were too general and unsubstantiated to support a statutory defence in this case.

REMEDY

[61] Section 45.2 of the *Code* sets out the Tribunal's remedial powers:

45.2 On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for

loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.

[62] The applicant testified that he felt frustrated and demoralized from struggling for many years to overcome the stigma of his past experience. He felt that he had earned a right to enter mainstream society and be treated with respect and dignity. However, he testified that a series of experiences, culminating in the offer and reneging of employment with the corporate respondent, left him feeling hopeless about overcoming prejudice and stereotypes based on his troubled past.

[63] The applicant testified that he was devastated by the respondent's actions. It was especially hard for him to face his girlfriend, Ms. Michaud, who had supported him through years of recovery and to whom he felt indebted. Obtaining paid employment was more than just about re-gaining a source of income and self-sufficiency, which he desperately needed; it was also about proving to himself and to others that he could "make it" as an upstanding and responsible citizen. The respondent's discriminatory conduct thwarted these legitimate and laudable goals.

[64] The courts have recognized the centrality of self-fulfilment to human dignity, which underlies the *Code's* prohibition against discrimination. It is evident that the corporate respondent's discriminatory conduct struck to the core of the applicant's dignity, exacerbated his experience of social alienation and denied him a meaningful opportunity to earn a wage for the sole reason of his record of offences. He is entitled to a remedy to restore his dignity and compensate him for his losses.

[65] At the same time, it is important to recall that the purpose of the *Code* is not to eliminate or compensate for all social consequences associated with being charged, tried, convicted and sentenced for a criminal offence. The definition of "record of offences" is limited to very specific conditions, without which the *Code* does not apply: see *de Pelham v. Mytrak Health Systems*, [2009 HRTO 172](#).

[66] The *Criminal Records Act*, R.S.C., 1985, c. C-47 ("CRA"), is a federal statute which provides the legal basis for granting a criminal pardon. In *Montréal (City) v.*

Québec (*Commission des droits de la personne et des droits de la jeunesse*), [2008 SCC 48](#), the Supreme Court considered the import of a pardon and quoted from an interdepartmental committee on the reform of the CRA, Proposal for Reform of the Criminal Records Act (July 20, 1991), p. 1:

The primary aim of a pardon, granted under the *Criminal Records Act* (CRA) is the removal, as completely as possible, of the negative consequences of conviction once the offender has fulfilled the sentence and enough time has elapsed to establish, with some degree of certainty, law abiding behaviour [para. 15].

[67] Section 5 of the *CRA* provides that the effect of a pardon includes that the “conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant’s character... and removes any disqualification or obligation to which the person so convicted is, by reason of the conviction, subject...”. In other words, the issuance of a pardon is a dignity-enhancing measure designed to remove barriers and ensure equal access in society. A pardon issued under the *CRA* is legislatively designed to promote the values of inclusion and anti-discrimination.

[68] The applicant argued that because the respondent failed to see beyond his conviction and consider his pardon, this had a grievous impact on his dignity and should therefore attract significant damages on the following basis:

- General damages in the amount of \$200,000;
- Mental anguish damages in the amount of \$200,000;
- Specific damages in the amount of \$275,000.

[69] The applicant did not rely on any case law in support of his remedial requests.

Monetary Compensation

[70] Monetary compensation is awarded as a way to make victims of discrimination whole. It includes both general damages for the impact on dignity and self-worth, and specific damages for lost wages. The exercise of quantifying the impact of discriminatory treatment on a person is not a precise science. It is important not to set the quantum of damages too low “since doing so would trivialize the social importance of the *Code* by effectively creating a ‘license fee’ to discriminate”: *Sanford v. Koop*, [2005 HRTO 53 \(CanLII\)](#), at para. 34. In *ADGA Group Consultants Inc. v. Lane*, (2008) [2008 CanLII 39605 \(ON SCDC\)](#), 295 D.L.R. (4th) 425, the Ontario Divisional Court held that tribunals should consider the following factors when awarding general damages: humiliation, hurt

feelings, the loss of self-respect, dignity and confidence, the experience of victimization, vulnerability, and the seriousness of the offensive treatment.

[71] Under the amended *Code*, there is no longer a separate head of damages for mental anguish. Instead, factors such injury to dignity, hurt feelings and wilful or reckless conduct, amongst others, are considered within the rubric of general damages.

[72] I accept the applicant's evidence, confirmed by Ms. Michaud, that he was deeply affected by the discriminatory treatment, suffered demoralization and lost hope. On the basis of my objective assessment, considering the context of historical stigma and discrimination against convicted persons in our society, even after a sentence has been served, I have no difficulty accepting that the impact of the discrimination on the applicant was profound.

[73] Furthermore, I accept that the impact of the corporate respondent's discriminatory treatment was exacerbated by the applicant's previous experience of feeling socially stigmatized on account of his criminal record. Enduring discrimination does not get easier with time. I accept the applicant's evidence that his experience with stigma and exclusion got more difficult to deal with as he endeavoured to move on. I also accept that upon securing his pardon in 2006, the applicant was entitled to and did in fact believe that he would be afforded a fresh start, free from the negative consequences of being convicted and serving a sentence. His hopes were dashed when he was discriminatorily denied employment with the corporate respondent.

[74] In addition to the effects of discrimination on the victim, it is also appropriate to consider the surrounding circumstances and incorporate an objective component to the quantification of monetary compensation: see *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 (CanLII). I am mindful that the discriminatory treatment consisted primarily of a single incident. However, the fact that the applicant's attempts to raise the issue of discrimination and to resolve it internally were rebuffed caused additional discriminatory effects.

[75] The corporate respondent argued that the applicant's evidence on damages was weak. He did not call any medical evidence, and instead testified to his sense of being diminished as a person. Counsel submitted that the applicant's evidence did not support a high damages award. Counsel argued for an award in the range of \$3,500 to \$7,500.

[76] I have reviewed the cases relied on by the respondent as well as others that are instructive. In *Bekele v. Cierpich*, 2008 HRTO 7 (CanLII), the Tribunal awarded a total of \$10,000 in monetary compensation in a case in which the applicant was subjected to a

higher degree of scrutiny in a condominium housing purchase because of his race, and the board of directors failed to investigate the allegation of racial discrimination. In *Thompson, supra*, the applicant was awarded \$3,000 after she voluntarily withdrew from a job application process because of a discriminatory question on the application regarding mental illness. In *Qureshi v. G4S Security Services*, [2009 HRTO 409 \(CanLII\)](#), the applicant was awarded \$5,000 after he was disqualified from a job competition because the employer was unwilling to accommodate his request for shifts that did not interfere with Friday religious observance. In *McDonald v. Mid-Huron Roofing*, [2009 HRTO 1306 \(CanLII\)](#), the applicant was awarded \$20,000 for being terminated as a result of taking time off to tend to his ill wife and child. The case that I find most instructive is *Maciel v. Fashion Coiffures Ltd., supra*, in which the applicant was awarded \$15,000 for being terminated on her first day of work after she disclosed that she was four and a half months pregnant.

[77] In the light of the facts of this case, I find that an award of \$15,000 in monetary compensation for the infringement of the applicant's rights under the *Code* is appropriate. As in *Maciel, supra*, the applicant was offered a job only to have it rescinded on the basis of a *Code*-related ground. As in *Bekele, supra*, the applicant endured the additional discriminatory effects of a failure by the respondent to take his concerns of discrimination seriously.

[78] The applicant is also entitled to monetary compensation for actual monies lost as a result of the discriminatory treatment. The right to lost wages is limited by the duty to mitigate and by the principle of remoteness, meaning that the applicant has a duty to minimize his financial losses by seeking alternative employment, and the respondent will only be responsible for losses that are not too far removed from its discriminatory conduct.

[79] The applicant testified that he has been receiving income support from the Ontario Disability Support Program "off and on" since around 1992. He has had little employment income during that time. His work as a writer, public speaker and counsellor has been mostly unpaid. The applicant testified that after May 2008, he did not actively look for work for some time, and that he had "given up". He eventually successfully applied for the position of Executive Director of a mental health and addictions facility in Sudbury. He began this permanent, full-time job in April 2009.

[80] The respondent urged me to find that the applicant has failed to prove any wage loss. Counsel argued that the onus of establishing damages rests on the applicant, and that he had failed to provide any documentary evidence, such as income tax returns or bank statements, supporting his claim of loss. There is no evidence of what he earned

during the relevant times other than his oral testimony, which counsel argued was not precise or reliable.

[81] Counsel also pointed me to the evidence of Jeanine Roy, who confirmed that the applicant worked for the March of Dimes on a part-time basis earning \$16.40 per hour starting in February 2008. She testified that the applicant quit that job in July 2008, two months after his unsuccessful bid for the teaching position with the College. Counsel argued not only was there no evidence of mitigation, but that the applicant actually quit a paying position at a time for which he seeks wage loss damages from the respondent. The applicant maintained that the position was ill-suited to his skills and expertise, and did not ensure a reliable income source.

[82] I accept the applicant's evidence that he would have earned \$25.00 per hour, working 25 hours a week for a period of 39 weeks had he not been discriminated against in the College's hiring decision. It is irrelevant whether he was or may have been earning additional part-time wages elsewhere, or indeed the fact that he quit his job at the March of Dimes, which included no guarantee of hours and was on an "as-needed" basis. What is clear is that, but for the corporate respondent's discriminatory hiring practice, the applicant would have earned \$24,375.00 for 39 weeks of part-time work. He is therefore entitled to compensation in that amount.

[83] The applicant also seeks damages for additional losses covering lost wages for the lost opportunity to teach additional courses, as well as to pay down debts and invest in a residential property. He further submits that he is out of pocket approximately \$5,000 for continuing his education, based on an assumption that he would not find work in his profession. I find that these additional damages for alleged out-of-pocket expenses and lost opportunities are insufficiently supported by evidence and, in any event, are too remote to be recoverable from the respondents.

Future Compliance Remedies

[84] The applicant also seeks remedies in the form of a written apology, a retraction of statements against the applicant, a public *mea culpa* published in the local newspaper, posting this Decision in all CTS offices and lobby, and steps to align the corporate respondent's hiring policies with the *Code*, including promoting the hiring of ex-offenders and recovering addicts through a quota system, and administering anti-discrimination training to CTS staff and counsel. The applicant also requests the Tribunal to compel the corporate respondent to hire him to administer the training and to be a consultant in developing appropriate policies and practices.

[85] It is clear that the corporate respondent would benefit from a remedy promoting future compliance with the *Code*. Training and awareness-raising are two important objectives of future compliance remedies. The remedial exercise is meant to be restorative and constructive, not punitive. For this reason, I will not order any remedy that seeks to shame or punish the respondents.

[86] The corporate respondent is directed to prepare a remedy plan promoting future compliance. Its plan should describe options that: (1) promote awareness of the *Code*'s prohibition on discrimination on the basis of record of offences among staff and students; and (2) combat the stigma and stereotyping in employment against convicted persons who have served their sentences and been pardoned. The plan must be delivered to the applicant and filed with the Tribunal no later than 60 days from the date of this Decision. The applicant will have 10 days from receiving the respondent's plan to deliver and file written submissions addressing the appropriateness of the plan.

[87] Upon reviewing the parties' materials, the Tribunal will order an appropriate future compliance remedy.

Interest

[88] The applicant is entitled to an order for pre-judgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "*CJA*"). Pre-judgment interest will run from the date of the Application, July 17, 2008. Post-judgment interest on the award is payable pursuant to section 129 of the *CJA*, beginning 30 days from the date of this Decision.

ORDER

[89] The corporate respondent is ordered to pay to the applicant the following amounts within 30 days of this Order:

1. \$15,000.00 as compensation for injury to his dignity, feelings and self-respect;
2. \$24,375.00, minus applicable statutory deductions, as compensation for his loss of employment income;
3. Pre-judgment interest in accordance with the *CJA*, on the amounts set out at 1. and 2., from July 17, 2008, to the date of this Decision.
4. Post-judgment interest on any accumulated principal and interest from the date that is 30 days after the date of this Decision.

[90] The parties are also ordered as follows:

1. Within 60 days from the date of this Decision, the respondent shall produce a plan for implementing a remedy to promote future compliance with the *Code*, in accordance with the conditions described in this Decision;
2. Within 10 days of receiving the respondent's plan, the applicant shall file submissions on the respondent's plan.

[91] I remain seized of this matter and will issue a final order with respect to the future compliance remedy upon reviewing the respondent's plan and the applicant's submissions.

Dated at Toronto, this 31st day of March, 2010.

"Signed by"

Faisal Bhabha
Vice-chair